

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the matter of)	
)	
Mobile Communications Holdings, Inc.)	File Nos. 11-DSS-P-91(6)
)	18-DSS-P-91(18)
)	11-SAT-LA-95
)	12-SAT-AMEND-95
Authority to construct, launch, and operate)	158-SAT-AMEND-96
an elliptical low-earth-orbit Mobile-Satellite)	
Service system)	Call Sign S2111

MEMORANDUM OPINION AND ORDER

Adopted: June 21, 2002

Released: June 24, 2002

By the Chief, International Bureau:

I. Introduction

1. In this order we deny Mobile Communications Holdings, Inc.'s petition for reconsideration of an International Bureau order holding that its license for a "Big LEO" satellite system is null and void for failure to meet a construction milestone requirement.

II. Background

2. In 1997, the International Bureau granted Mobile Communications Holdings, Inc. ("MCHI") a license to launch and operate a sixteen-satellite "Big LEO" system for provision of two-way voice and data communications to customers equipped with mobile earth stations.¹ The license order prescribed a construction-progress milestone schedule: MCHI was to commence construction of at least two satellites by July 1998, commence construction of the other fourteen satellites by July 2000, complete construction of the first two satellites by July 2001, and place the system fully into operation by July 2003.² The order declared that the license would become null and void in the event that MCHI failed to meet the milestone schedule.³

¹ *Mobile Communications Holdings, Inc.* (Order and Authorization), DA 97-1367, 12 FCC Rcd 9663 (Int'l Bur. 1997), *applications for review pending* ("MCHI License Order").

² The schedule afforded MCHI the same amounts of time as were afforded to other Big LEO licensees. *See, e.g., Motorola Satellite Communications, Inc.* (Order and Authorization), DA 96-1789, 11 FCC Rcd 13952 (Int'l Bur. 1996), and *L/Q Licensee, Inc.* (Order and Authorization), DA 96-1924, 11 FCC Rcd 16410 (Int'l Bur. 1996). *See also Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands* (Report and Order), CC Docket No. 92-166, FCC 94-261, 9 FCC Rcd 5936 ¶189 (1994).

³ *MCHI License Order* at ¶42.

3. Under the Commission's rules, each Big LEO licensee must file a statement within ten days of each of its milestone deadlines, either certifying that it has met the milestone requirement or giving notice that it has failed to meet it.⁴ Accordingly, in a letter filed on June 22, 1998, a company official reported that MCHI had met its first milestone requirement by entering into a non-contingent "Satellite Construction and System Definition Contract" with The Boeing Company for the first two satellites in its system ("Boeing SC-SD Contract").⁵

4. On July 31, 2000, the milestone deadline for commencing construction of the other fourteen satellites, counsel for MCHI filed an affidavit signed by MCHI's president, David Castiel, stating that "MCHI has entered into a binding, non-contingent contract with Teledyne Brown Engineering, Inc. ... relating to the construction of the satellites consistent with the milestones and technical specifications set forth in MCHI's [license]."⁶ The Commission subsequently requested that MCHI submit copies of its contracts for satellite construction, including any amendments.⁷ In response, MCHI submitted copies of a "Memorandum of Agreement" between MCHI and Boeing dated April 22, 1998, with later amendments; the Boeing SC-SD Contract, with later amendments; and a "Program Management Contract for the Construction of the ELLIPSO System" between MCHI and Teledyne Brown Engineering, Inc. ("TBE"), dated July 1, 2000.⁸

5. In an order released on May 31, 2001, the International Bureau found, from examination of the submitted contractual documents, that MCHI had, as previously reported, entered into a two-satellite construction contract with Boeing prior to the first milestone deadline.⁹ The Bureau found, however, that the parties had subsequently adopted amendments that essentially nullified the Boeing construction contract.¹⁰ Furthermore, the Bureau found that the contract with TBE mentioned in MCHI's second milestone certification did not require TBE to build or deliver satellites for MCHI and was subject to unresolved material contingencies.¹¹ Hence the Bureau found that MCHI had not entered into a non-contingent contract by the end of July 2000 that provided for construction of fourteen more satellites, as required by its second milestone. Because MCHI had not requested an extension of the second milestone deadline, moreover, the Bureau concluded that its Big LEO license was null and void by operation of the license condition requiring adherence to the milestone schedule.¹²

6. In an unopposed petition filed on July 2, 2001 and supplemented on March 29, 2002, MCHI asked the Bureau to reconsider the *License Cancellation Order* and reinstate the license nunc pro

⁴ 47 C.F.R. § 25.143(e)(2) (2001).

⁵ Letter dated June 19, 1998 to the Commission's Secretary from Pedro L. Rustan, Vice President, Space Segment Technology and Operations Group.

⁶ Letter dated July 31, 2000 to the Commission's Secretary from Raul Rodriguez and David Keir, counsel for MCHI.

⁷ Letter dated September 28, 2000 to counsel for MCHI from Thomas Tycz, Chief of Satellite and Radiocommunication Division, International Bureau, FCC.

⁸ These documents have been treated as confidential in compliance with an uncontested request from MCHI.

⁹ *Mobile Communications Holdings, Inc.* (Memorandum Opinion and Order), DA 01-1315, 16 FCC Rcd 11,766 (Int'l Bur. 2001) ("*License Cancellation Order*").

¹⁰ *Id.* at ¶7.

¹¹ *Id.* at ¶¶ 8 and 9.

¹² *Id.* at ¶10.

tunc.¹³

III. Discussion

7. MCHI concedes in its reconsideration petition that the TBE contract is not a construction contract and therefore that the execution of that contract did not satisfy the requirement to commence construction of fourteen more satellites by the end of July 2000.¹⁴ MCHI maintains, however, that it met that second milestone requirement (as well as the first) when it signed the Boeing SC-SD Contract in June 1998.¹⁵ MCHI argues that the execution of the SC-SD Contract satisfied the second milestone requirement because it provided not only for construction of two satellites but also for performance of system-wide design work.¹⁶

8. The SC-SD Contract did, in fact, require Boeing to perform various tasks pertaining to planning or design for all of MCHI's proposed satellites. For instance, it required Boeing to "accomplish a thorough simulation, analysis, and review of the Ellipso System Architecture" to determine performance requirements consistent with MCHI's business plan; to present estimates of the cost and time required to achieve the desired performance; to develop a test plan for pre- and post-launch performance verification; and to develop a master work schedule.¹⁷ The contract only required Boeing to *construct* two satellites, however. The parties made this plain in the contract's preamble, in which they declared that their intention was "to enter *now* into a contract for ... the construction of the first two (2) satellites of the Initial ELLIPSO Constellation" (emphasis added) and to negotiate another contract for construction of the remaining satellites at a later time.¹⁸ The SC-SD Contract obliged Boeing to design and build two satellites pursuant to a detailed work-schedule in a 27-page attachment labeled "Statement of Work for the Construction of the First Two (2) Spacecraft in the ELLIPSO Constellation." The schedule required Boeing to complete construction of the two satellites, successfully test them, and prepare them for shipping to the launch site by June 30, 2001, the date of MCHI's milestone deadline for completing construction of its first two satellites.¹⁹ In contrast, there were no provisions in the contract requiring Boeing to undertake physical construction of the other fourteen proposed ELLIPSO satellites and complete their construction on or before MCHI's milestone deadline for making its system fully

¹³ Because MCHI's associated requests for waiver of its third milestone requirement (completion of construction of two satellites) and for extension of the remaining milestone deadlines are made moot by our disposition of the request for reconsideration, we do not find it necessary to discuss those requests.

¹⁴ "Petition for Reconsideration and Reinstatement *Nunc Pro Tunc*, and Request for Waiver of Construction Milestones" filed July 2, 2002 ("*Recon. Petition*"), at n.28.

¹⁵ MCHI does not explain why its president mentioned the TBE contract, rather than the Boeing SC-SD Contract, in the affidavit submitted on July 31, 2000 to certify compliance with the second milestone requirement. MCHI alleges that it advised the Commission in an annual status report filed on June 30, 1998 that the execution of the Boeing SC-SD Contract earlier that month satisfied both the first and second milestone requirements. In fact, however, MCHI did not mention the second milestone requirement in the June 1998 status report. Rather, it reported that it had met the *first* milestone requirement by signing a two-satellite construction contract with Boeing and added that "[d]esign work for the rest of the spacecraft ... has commenced." *Recon. Petition*, Attachment 2.

¹⁶ MCHI also argues that the finding that the parties eventually abrogated the SC-SD contract is immaterial to the issue of milestone compliance. It contends that the execution of a non-contingent contract for construction of satellites in advance of a milestone deadline for commencing their construction satisfies the pertinent construction-commencement requirement, whether or not the contract is kept in force until satellite construction is complete. We do not reach this argument, since our determination that the SC-SD contract did not cover construction of the satellites to which the second milestone requirement pertained is of dispositive significance in any event.

¹⁷ Boeing SC-SD Contract, Exhibit A-2.

¹⁸ *Id.* at 1.

¹⁹ *Id.* at Articles 2 and 3.1 and Exhibit A-1.

operational.

9. There is no evidence that MCHI subsequently entered into another contract that provided for construction of the remaining fourteen satellites, or that it amended the Boeing SC-SD Contract to provide for their construction. In conversations with International Bureau staff after the filing of MCHI's petition for reconsideration, counsel for MCHI alleged that there were further documents in Boeing's possession that confirmed that Boeing was contractually obliged to construct and deliver the other fourteen ELLIPSO satellites by a date consistent with MCHI's milestone requirements. At the staff's request, counsel submitted the documents with a request that they be withheld from public disclosure.²⁰ The documents submitted with the March 29 letter, however, are not new construction contracts or amendments of the SC-SD Contract. Rather, they are a proposed master work schedule and a proposed system testing plan that Boeing was required, under the SC-SD Contract, to submit to MCHI for approval at a preliminary program-review session. Although the testing plan indicates that Boeing would be responsible for post-construction testing of the components of the entire ELLIPSO System, neither document purports, by its terms, to require Boeing to build the additional fourteen ELLIPSO satellites. Furthermore, neither document appears to have had any binding effect. Neither includes a signature page. The testing plan is prominently marked "DRAFT" at the top of its title page, and the work schedule's title page includes a statement in boldface type that "[t]hese documents are provided for informational purposes only and are not contractually binding." We therefore find that these documents are immaterial.

10. Thus, instead of demonstrating that it made a binding contractual commitment to pay for full construction of the other fourteen ELLIPSO satellites, MCHI is asking us to rule that it met the milestone requirement to commence constructing them by signing a contract that expressly provided only for the construction and delivery of the first two satellites.

11. The Commission prescribes milestone schedules in satellite authorizations in order to prevent spectrum and orbital assignments from being "warehoused."²¹ To meet a milestone deadline for commencing construction of satellites, a licensee relying on a contractor to perform the work must enter into a "non-contingent" construction contract.²² The Commission has held that execution of a contract in which payment and performance obligations were contingent upon elective action by the licensee would not satisfy a construction-commencement requirement, because it would not sufficiently commit the parties to completing construction of the satellites.²³ Similarly, the execution of a contract that does not provide for complete construction of the satellites in question by a specified date consistent with the licensee's milestone deadline for making its system fully operational cannot satisfy a construction-commencement milestone requirement.²⁴ To hold otherwise would disserve the policy objectives of the

²⁰ Letter dated March 29, 2002 to the Chief, International Bureau from Raul R. Rodriguez, Stephen D. Baruch, and Philip A. Bonomo, counsel to MCHI.

²¹ *MCI Communications Corporation* (Memorandum Opinion and Order), DA 87-24, 2 FCC Rcd 233 ¶5 (CC Bur. 1987); *National Exchange Satellite, Inc.* (Memorandum Opinion and Order), DA 92-294, 7 FCC Rcd 1990 (CC Bur. 1992).

²² *Norris Satellite Communications Corporation* (Memorandum Opinion and Order), FCC 97-377, 12 FCC Rcd 22299 ¶9 (1997).

²³ *CBS, Inc. et al.* (Memorandum Opinion and Order), FCC 84-477, 99 FCC 2d 564 (1984) at ¶8.

²⁴ *Cf. EchoStar Satellite Corporation* (Memorandum Opinion and Order), FCC 92-66, 7 FCC Rcd 1765, 1767 ¶11 (1992), and *Tempo Enterprises, Inc.* (Memorandum Opinion and Order), FCC 86-408, 1 FCC Rcd 20, 21 ¶7 (1986) (a contract must, *inter alia*, specify dates for the start and completion of satellite construction for its execution to satisfy a DBS permittee's "due diligence" requirement to either commence actual satellite construction or "complete contracting for satellite construction" within one year after receiving a construction permit). *See also Morning Star Satellite Company, LLC* (Memorandum Opinion and Order), FCC 01-179, 16 FCC Rcd 11550 (2001) at ¶5.

milestone rules. We therefore reaffirm the finding that MCHI failed to meet the license condition requiring it to commence construction of fourteen additional satellites by the end of July 2000 and that its license is consequently null and void.

IV. Ordering Clauses

12. Accordingly, IT IS ORDERED that MCHI's petition for reconsideration and reinstatement IS DENIED.

13. IT IS FURTHER ORDERED that MCHI's associated requests for waiver of its third milestone requirement and extension of further milestone requirements ARE DISMISSED as moot.

14. This order is effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

Donald Abelson
Chief, International Bureau